No. 94-1033

JAN 9 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

COMPUTER CURRICULUM CORPORATION,

Petitioner,

—v.—

INSTRUCTIONAL SYSTEMS, INC., and DEBORAH T. PORITZ, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that 28 U.S.C. § 1738 and 28 U.S.C. § 1652 required that preclusive effect be given to a final judgment of the New Jersey Supreme Court holding that New Jersey law governed the relationship between the parties and that the relationship was a franchise?

2. Did the Court of Appeals err in holding that the territorial and exclusivity provisions of the franchise were not mandated by New Jersey law but were the consequence of the parties volitional action in specifying these terms in the franchise agreement?

3. Did the Court of Appeals err in holding that neither it nor the New Jersey Supreme Court had before it evidence relating to termination under the applicable provisions of the Franchise Practices Act and could not, therefore, determine on this record whether those facts were sufficient to raise Constitutional issues under the Commerce Clause?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

Respondent Instructional Systems, Inc. ("ISI"), the plaintiff, is a New Jersey Corporation the stock of which is not publicly traded. Respondent Attorney General of the State of New Jersey intervened to resist a challenge by Petitioner Computer Curriculum Corporation ("CCC") to the constitutionality of the New Jersey Franchise Practices Act. CCC is a wholly-owned subsidiary of Simon & Schuster, Inc., which in turn is a wholly-owned subsidiary of Paramount, Inc., which was recently acquired by Viacom, Inc.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the Constitutional and statutory provisions set forth in CCC's Petition for Writ of Certiorari:

The Rules of Decision Act provides:

> The laws of the several states, except when the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U.S.C. § 1652.

The Full Faith and Credit Act provides:

> . . . [a]cts, records and judicial proceedings . . . [of State courts] shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken. 28 U.S.C. § 1738, cl. 3.

The New Jersey Franchise Practices Act provides:

> This [Franchise Practices] Act shall not apply to a franchise granted prior to the effective date of this Act, provided, however, that a renewal of a franchise or an amendment to an existing franchise shall not be excluded from the application of this Act. N.J.S.A. 56:10-8.

STATEMENT OF THE CASE

In 1971 the New Jersey Legislature, codifying some features of New Jersey's common law,[1] enacted the Franchise Practices Act ("NJFPA"). L. 1971 c 356 §§ 1-12, eff. Dec. 21, 1971. The NJFPA defines a franchise as "a written arrange-

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[1] *See Shell Oil Co. v. Marinello*, 63 N.J. 402, 409, 307 A.2d 599 (1973), *cert. denied*, 415 U.S. 920 (1974); *Westfield Center Service v. Cities Serv. Oil*, 86 N.J. 453, 462-63, 432 A.2d 48 (1981).

ment for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise." N.J.S.A. 56:10-3(a). The NJFPA applies only to a franchise "the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey." N.J.S.A. 56:10-4. Moreover, it applies only if more than twenty percent of the franchisee's gross sales are derived from the franchise. *Id.* The NJFPA requires a sixty-day written notice of the termination, cancellation, or failure to renew a franchise, setting forth the reasons for any such action.[2] N.J.S.A. 56:10-5. The NJFPA also provides:

> It shall be a violation of this act for a franchisor to terminate, cancel or fail to renew a franchise without good cause.

Id. Good cause is "limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise." *Id.*

Neither the NJFPA nor any other provision of New Jersey law requires a franchisor to grant to a franchisee the right to distribute goods or services in a defined territory. Neither the NJFPA nor any other provision of New Jersey law requires a franchisor to grant to a franchisee any exclusive distribution rights. As was the case prior to the enactment of the NJFPA, distribution territory and distribution exclusivity are matters left by New Jersey law entirely to party choice at the time the franchise contract is negotiated.

In 1984, more than a dozen years after the effective date of the NJFPA, CCC and ISI entered into the contract that is the

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[2] The Act imposes on franchisees a notice of transfer obligation. N.J.S.A. 56:10-6.

subject of the instant lawsuit.[3] That agreement gave ISI the exclusive right to distribute CCC products in New Jersey, nine other states, and the District of Columbia. The NJFPA had no impact on the exclusivity or territoriality features of the parties' agreement. Those features were chosen, after the effective date of the NJFPA, by the parties in negotiations entirely unconstrained by New Jersey law respecting exclusivity or territory. Moreover, even the termination provisions of the NJFPA could have been avoided simply by not entering into a franchise contract after the effective date of that Act. N.J.S.A. 56:10-8.

In 1989, CCC, without giving the notice required by N.J.S.A. 56:10-5, failed to renew the 1984 agreement. CCC unilaterally tendered to ISI a different contract in which ISI's territory was reduced to three states: New Jersey, New York and Massachusetts. ISI signed the 1989 contract under protest and promptly filed this lawsuit. The suit was filed in the Superior Court of New Jersey, as expressly authorized by the NJFPA.[4]

CCC removed the action to the United States District Court on the basis of diversity of citizenship. 28 U.S.C. § 1441(a). When ISI moved before the District Court for a preliminary injunction, CCC urged: (1) that California law, not New Jersey law, applied to the agreement; (2) that the 1984 contract was not a franchise as defined by the NJFPA; and (3) that CCC's termination did not violate the NJFPA. CCC also urged: that if its actions violated the NJFPA the application of

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[3] Although this lawsuit involves the 1984 contract, the New Jersey trial court found as a fact that the franchise relationship was first formed in a 1980 contract. RA 2.

[4] "Any franchisee may bring an action against its franchisor for violation of this act in the Superior Court of the State of New Jersey to recover damages sustained by reason of any violation of this act and, where appropriate, shall be entitled to injunctive relief." N.J.S.A. 56:10-10.

the statute to a franchise territory outside New Jersey violated the dormant Commerce Clause. CCC has never contended that the NJFPA is inconsistent with any federal legislation.

The District Court declined to decide ISI's motion for a preliminary injunction and entered an order remitting to the Superior Court of New Jersey the state law issues raised by CCC. RA 16. The District Court action was "administratively stayed and terminated" pending a final judgment in the New Jersey state courts. RA 16.

Pursuant to the District Court's order, ISI promptly filed suit in the New Jersey Superior Court, Chancery Division, for declaratory relief. On cross-motions for summary judgment the trial court entered a declaratory judgment in ISI's favor, holding: (1) that New Jersey law, not California law, applied to the 1984 agreement; (2) that the 1984 agreement was a franchise; and (3) that the franchise territory, defined by the parties, included ten states and the District of Columbia. That declaratory judgment also states:

> The Court has stated that the Legislature did not intend the law of New Jersey to have extraterritorial effect. ISI and CCC in the contract, which is the franchise, defined a market area which includes states beyond the State of New Jersey. The Legislature intended the Act to apply to New Jersey franchises and the rights thereunder whether or not the market area is beyond New Jersey. To the extent that the laws of other states apply by reason of activities of the parties and the terms of those laws, they would apply.

RA 3. The trial court's finding that the parties—not New Jersey law—determined the franchisee's market area is consistent with N.J.S.A. 56:10-8.

The Appellate Division of the Superior Court reversed the trial court's finding that the 1984 contract was a franchise under the NJFPA. *See Instructional Systems, Inc. v. Computer*

Curriculum Corp., 243 N.J. Super. 53, 578 A.2d 876 (App. Div. 1990). The New Jersey Supreme Court reversed, and reinstated the judgment of the Chancery Division. *See Instructional Systems, Inc. v. Computer Curriculum Corp.*, 130 N.J. 324, 614 A.2d 124 (1992). The Supreme Court of New Jersey held:

(1) That the trial court did not err in finding as a fact that the relationship between the parties, as set forth in the 1984 contract, is a franchise under the NJFPA. *Id.* at 347-66.

(2) That the trial court did not err in holding that despite the choice of law clause in the 1984 contract, New Jersey law governs the relationship between the parties because "New Jersey had the overriding interest in the fair treatment of its franchisees." *Id.* at 341-46.

The New Jersey Supreme Court further noted affirmatively that the trial court "qualified its interpretation of New Jersey law to the extent that it actually conflicted with the law of sister states." *Id.* at 346.

Rejecting the very argument made in CCC's Petition for Certiorari, the New Jersey Supreme Court observed that were the argument to be accepted:

> . . . nearly every aspect of substantive state law would be disabled from affecting the conduct of multi-state corporations. When New Jersey law imposes a legal duty on the volitional behavior of a contracting party, that ruling will often have effects beyond state boundaries. For example, if the issue were one of straight contract law, *i.e.*, had the contract precluded termination of the out-of-state territory, the New Jersey common law upholding the contract would be regulating commerce that takes place wholly outside of the state's borders. In terms of state power, whether state contract law or state statutory

> law is applied to the in-state activity makes no difference.

Id. at 369.

Thus, both the New Jersey trial court and the New Jersey Supreme Court focused upon the indisputable fact that the parties' volitional action, not state law, resulted in a franchise agreement with a New Jersey franchisee granting an exclusive territory; issues of exclusivity and territory as to which New Jersey law, prior to that volitional action, was indifferent.

The final judgment of the highest state court of New Jersey (assuming it decided a federal question) was reviewable in the United States Supreme Court and no other. 28 U.S.C. § 1257; 28 U.S.C. § 1738; *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). CCC did not seek such review.

When the parties returned to the District Court, CCC made the argument that it tenders in its Petition for Certiorari, namely, that it was not volitional party action that determined exclusivity and territory, but rather the NJFPA. The District Court fell for this fallacious argument. *See Instructional Systems, Inc. v. Computer Curriculum Corp.*, 826 F. Supp. 831 (D. N.J. 1993). The Court of Appeals did not. *See Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813 (3d Cir. 1994). The Court of Appeals opinion acknowledged the binding effect of the New Jersey judgment on state choice of law rules, on state law, and on the facts with respect to the existence of a New Jersey franchise relationship voluntarily undertaken by the parties. *Id.* at 823. That Court held that "the judgment the parties received from the New Jersey courts on the state law claims binds them." *Id.*

REASONS FOR DENYING THE WRIT

I. THE "QUESTIONS PRESENTED" IN CCC'S PETITION FOR CERTIORARI ARE NOT PRESENTED IN THE RECORD IN THE COURT OF APPEALS.

The Court should not grant CCC's hyperbolic and deceiving petition "in the mistaken belief that the issues presented can be decided." Supreme Court Rule 15.1. The questions CCC purports to present were not presented by the summary judgment record in the District Court. The Court of Appeals recognized that they were not and properly decided, instead, the questions set forth at the front of this brief.

A. The Court of Appeals Decision Does Not Conflict With This Court's *Healy* and *Brown-Forman* Decisions

In the District Court CCC, in a slick piece of misdirection which relies on a false premise, constructed a superficially logical syllogism that misled that Court into granting summary judgment against ISI. The syllogism proceeds thus:

Major Premise:

> New Jersey law cannot directly regulate commerce in other states. *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986).

Minor Premise:

> New Jersey law directly regulates commerce in other states by requiring that ISI's exclusive territorial franchise be terminated only in accordance with the terms of the New Jersey Franchise Practices Act, N.J.S.A. 56:10-5.

Conclusion:

> Therefore, N.J.S.A. 56:10-5 is unconstitutional.

The District Court failed to recognize that the syllogism contained a false minor premise. New Jersey has *no* policy respecting either the territorial extent or the exclusivity of franchises. Both matters are left entirely to the agreement of the parties.

The Court of Appeals did not fall for CCC's misdirection. As Chief Judge Sloviter correctly observed:

> In this case the record is clear that it was the parties, not New Jersey, who contemplated that the franchisee maintain a place of business in New Jersey. And it was the parties, not New Jersey, who bound themselves to an exclusive multistate distribution agreement. Therefore it was the parties' own agreement which operated to project the New Jersey law outside of New Jersey's borders, a result which CCC will find ironic but which inevitably follows from the choice-of-law analysis.

Instructional Systems, Inc. v. Computer Curriculum Corp., 35 F.3d at 825. Chief Judge Sloviter's reasoning is sound. The NJFPA, like the common law before it, is concerned with the fairness of the contractual terms, not with the regulation of commerce. The requirement that a franchise may not be terminated except for good cause applies equally to a single intrastate location or many locations in many states. Conceptually, it is no different from other fairness provisions developed by the common law and often embodied in statutory codifications, such as the Uniform Commercial Code. Contracts governed by such provisions usually involve interstate commerce. Contracts of adhesion, for example, often do. And the requirements of good faith and fair dealing are not confined to intrastate business. CCC would have the Court focus exclusively upon the geographic scope of the franchise business, not the franchise contract itself. But it is a single

contract and a single state law governs its fairness and performance. CCC argues that it never agreed to be bound by New Jersey law. But if New Jersey law is the proper law of the contract, CCC did agree as a matter of law. It cannot now be heard to plead ignorance of the consequences of what it did. The applicability of New Jersey law has already been finally adjudicated.

Thus *Healy* and *Brown-Forman*, on which CCC bases its dormant Commerce Clause argument are simply not in point. Those cases were not concerned with contractual fairness but with state regulation of prices to protect local consumers. To illustrate that crucial difference, let us hypothesize that the brewers in *Healy* or the distillers in *Brown-Forman* had voluntarily contracted with a distributor in State A that they would afford that distributor prices and terms no less favorable than those charged to distributors in adjoining states B and C. Surely, CCC's attorneys would not with a straight face advance the proposition that *Healy* or *Brown-Forman* required invalidating the brewers' or distillers' voluntarily assumed contractual undertakings. Yet enforcing the parties' contract in accordance with State A's contract law would have an economic effect essentially the same as the effect of the state price-posting statutes struck down in those cases.[5] As Judge Sloviter correctly observes:

> However, in [*Healy* and *Brown-Forman*] it was the state, operating independently of any parties' contract, which dictated the extraterritorial effect.

Instructional Systems, Inc. v. Computer Curriculum Corp., 35 F.3d at 825-26. Absent such state independent action, the Commerce Clause has no application. The Court's dormant Commerce Clause jurisprudence relates to the allocation between the states and the national government of political power to regulate commerce, not to private decision making.

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[5] This point was made in Justice O'Hern's Opinion for the Supreme Court of New Jersey, quoted at p. 5, *supra*.

Similar misdirection is attempted in CCC's argument, Petition, 20, predicated upon *Western & Southern L.I. Co. v. Calif. Board of Equalization*, 451 U.S. 648, 664 (1981). That case articulates the proposition that a state may not impose as a condition for doing business in the state the relinquishment of constitutional rights. New Jersey imposed *no* condition on CCC's doing business in New Jersey. It did not say that CCC had to do business with a New Jersey franchisee. It did not say that a franchise with a New Jersey franchisee had to be exclusive. It did not say that the franchise had to be for a multistate territory, or indeed any specific territory. The only condition imposed was that if CCC entered into a franchise contract with a franchisee having a place of business in New Jersey, that contract could be terminated only in compliance with the NJFPA. All else was a matter of negotiation and party action.

B. The Court of Appeals Employed Well Established Rules of Law, Not "Legal Fictions".

In a futile effort to avoid Chief Judge Sloviter's solid Commerce Clause analysis, CCC's Petition for Certiorari urges that the Court of Appeals employed "*LEGAL FICTIONS [THAT] WOULD SERIOUSLY ERODE THE PROTECTIONS OF THE COMMERCE CLAUSE.*" Petition, 17.

The CCC argument is disingenuous. It assumes, contrary to the facts, that the California choice of law provision and the five-year term set forth in the 1984 agreement are binding upon the parties. That simply is not so. The Supreme Court of New Jersey, in a judgment that is final and unreviewable, held: (1) that CCC had voluntarily entered into a franchise contract with a franchisee located in that state; (2) that despite the choice of law provision in the contract, New Jersey choice of law rules required the application of New Jersey law to that relationship; and (3) that despite the five-year term set forth in the contract, New Jersey law determined how that relationship may be terminated. *Instructional Systems,*

Inc. v. Computer Curriculum Corporation, 130 N.J. 324, 614 A.2d 124 (1992). As Chief Judge Sloviter aptly puts it, "the essence of-CCC's objection, despite its assurance to the contrary, goes to New Jersey's decision on choice of law." *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d at 826.

The Court of Appeals opinion acknowledges what the CCC Petition for Certiorari fails to address; namely, the binding effect of the New Jersey judgment on state choice of law rules, on state law and on the facts with respect to the existence of a New Jersey franchise relationship voluntarily undertaken by the parties. *Id.* at 823. *See* 28 U.S.C. § 1652; *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (state choice of law rules must be followed in a diversity case); *Electrical and Magneto Service v. Amtac Intern.*, 941 F.2d 660 (8th Cir. 1991) (franchisor cannot avoid application of forum's choice of law rule by inserting a choice of law clause in a franchise agreement); 28 U.S.C. § 1738; *Migra v. Warren County School Dist. Bd. of Ed.*, 465 U.S. 75, 84 (1984); *Allen v. McCurry*, 449 U.S. 90, 99 (1980) (federal court is bound to extend same preclusive effect to state court judgment as courts of rendering state would); *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)*; *Port Auth. Police Benevolent v. Port Auth. of N.Y. and N.J.*, 973 F.2d 169, 177 (3d Cir. 1992) (under *Rooker-Feldman* doctrine lower federal courts lack subject matter jurisdiction to engage in appellate review of state court determinations even if those determinations are intertwined with federal constitutional claims). Neither 28 U.S.C § 1652 nor 28 U.S.C. § 1738 nor the jurisdictional provisions of Title 28 that are the source of the *Rooker-Feldman* doctrine are "Legal Fictions." They are rules of law which bound the District Court and the Court of Appeals, and controlling authority for this Court as well.

The Court of Appeals' holding that "the judgment the parties received from the New Jersey courts on the state law

claims binds them," *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d at 823, is unassailable. Recognizing as much, CCC's Petition for Certiorari conveniently ignores that insurmountable obstacle. CCC hopes that its false assertion that the contractual choice of law clause and the contractual five-year term clause bind the parties will mislead members of this Court as that same false assertion misled the District Court.

No amount of smoke and mirror advocacy can change the facts that after the enactment of the NJFPA, CCC voluntarily entered into a New Jersey franchise contract; that CCC voluntarily made that relationship exclusive, although New Jersey law did not require exclusivity; and that CCC voluntarily defined the franchise territory to cover eleven jurisdictions, although New Jersey law says nothing about franchise territories. The Court of Appeals' holding that it was the parties, not the State of New Jersey, that did any "projection" is solidly grounded on these unassailable facts. Thus there is no conceivable conflict with the *Healy* and *Brown-Forman* cases on which CCC relies.

C. There is No Record Evidence of a *Pike v. Bruce Church* Violation.

CCC's criticism of the Court of Appeals' treatment of the balancing test of *Pike v. Bruce Church*, 397 U.S. 137 (1970), Petition, 24, is also factually and logically flawed. The *Pike* rule is that a state law that does not discriminate against out-of state participants in interstate commerce but nevertheless places some burden on such commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. The NJFPA applies evenhandedly to in-state and out-of-state franchisors. Thus any burden applies equally to all franchisors. Moreover, the NJFPA is prospective only, and even prospectively does not limit the contractual undertakings of franchisors except with respect to termination or non-renewal. Thus the narrow

issue tendered by CCC in Point III of its Petition is whether New Jersey regulation of the termination or non-renewal of all New Jersey franchises imposes an undue burden despite New Jersey's obvious interest in such franchises.

The case was before the Court of Appeals on a summary judgment record. Because CCC urged, both in the New Jersey Courts and in the District Court, that the NJFPA was a *per se* violation of the Commerce Clause, no evidence was tendered by CCC in support of the summary judgment motion with respect to the extent of the burden on interstate commerce resulting from the termination and non-renewal provisions of that Act. Since none was tendered there was no occasion for ISI to offer contrary evidence. As the Court of Appeals pointed out, any such evidence, if it exists, might have to await the interpretation given to "good cause" under the NJFPA termination provision. *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d at 827. Since in 1989 no proper notice of termination was given, and failure to give such notice, standing alone, is a violation of the NJFPA, such evidence even if tendered will be excluded as irrelevant. Thus this Court could not, consistent with due process, undertake on the present record to adjudicate a *Pike* balancing issue. Moreover, it is unlikely in this case ever to be presented with a record containing a *Pike* balancing issue.

What *is* established by the present record is that the State of New Jersey had a sufficient interest in the relationship between the parties so that its law should apply to that relationship; that the relationship was voluntarily created after the effective date of the NJFPA; that New Jersey does not require anyone to distribute goods and services through a franchisee; and that New Jersey law requires neither a defined franchise territory nor exclusivity. Thus the *Pike* contention comes down to this: the termination or non-renewal provisions in the NJFPA, standing alone, impose a burden on all voluntarily undertaken relationships such that "the burden imposed on interstate commerce is clearly excessive in relation to the

putative local benefits." *Pike v. Bruce Church*, 397 U.S. at 142.

The putative local benefits are clearly identified in opinions of the New Jersey Supreme Court. In *Shell Oil Co. v. Marinello*, 63 N.J. 402 (1973), *cert. denied*, 415 U.S. 920 (1974), the Court noted that there was grossly disproportionate bargaining power between franchisors and franchisees, and held that in such a situation it would declare as void against public policy contractual provisions that would result in the forfeiture of a franchisee's investment. When it enacted the NJFPA, New Jersey in effect codified its common law contract rule.

> Prompted in large measure by the unfair practices of automobile manufacturers and major oil companies, New Jersey passed the Franchise Practices Act in 1971. N.J.S.A. 56:10-1 to -12. This Act was supplemented in 1977 with four sections, two of which specifically concern automobile franchises. See N.J.S.A 56:10-7.1 and 56:10-13. In 1982, the Legislature passed the Motor Vehicle Franchises Act, N.J.S.A. 56:10-16 to -25 (now N.J.S.A. 56:10-16 to -29). The Franchise Practices Act (the Act) provides franchisees protection against indiscriminate terminations by prohibiting cancellation or non-renewal of franchises for other than good cause. The Act's supporters indicated that "[t]his bill gives neither the franchisor nor franchisee the upper hand. What it does, however, is to prevent arbitrary or capricious actions by the franchisor who generally has vastly greater economic power than the franchisee." Franchise Practices Act: *Hearing on A. 2063 Before the Assembly Judiciary Comm.*, 194th Leg., 2d Sess. 136 (1971) (Hearing on A. 2063) (Statement of Charles W. Davis, Executive Vice-President New Jersey Hotel/Motel Ass'n).

Instructional Systems, Inc. v. Computer Curriculum Corporation, 130 N.J. at 340-41. *See also Westfield Center Service*

v. Cities Serv. Oil, 86 N.J. 453, 462-63, 432 A.2d 48 (1981). New Jersey has thus clearly identified a highly significant local benefit from the NJFPA termination provisions.

All that the record discloses with respect to burden on interstate commerce, however, is that CCC is offended at having lost its case on the existence of the franchise relationship and on New Jersey choice of law. Because those issues are foreclosed, 28 U.S.C. § 1738; 28 U.S.C. § 1652, CCC insists with great heat but no light that catastrophic consequences to the free flow of interstate commerce will result from the NJFPA provisions. The only record evidence is that one contracting franchisor, CCC, must continue doing business with one New Jersey franchisee, ISI, so long as ISI does not materially breach the franchise agreement. There is no evidence establishing that even CCC's own interstate commerce has been reduced or inhibited. There is simply nothing of record for the Court to balance on the burden on interstate commerce side of the *Pike* equation.

While we do not believe it will be possible even after trial for CCC to present facts which could invoke a *Pike* excessive burden issue, it is clear that no such facts were before the New Jersey Supreme Court or the Court of Appeals. It will be time enough for this Court to address the hypothetical questions suggested by CCC, Petition, 24, when and if relevant facts exist in the record on appeal.

II. THIS CASE HAS NO SIGNIFICANCE TO ANYONE EXCEPT ISI AND CCC, AND THERE IS NO REASON FOR GRANTING CERTIORARI.

CCC's Petition is replete with overblown rhetoric to the effect that the Court of Appeals decision "would permit individual states . . . to usurp Congress' exclusive power to regulate the national economy," Petition, 9, "threatens every manufacturer, in every sector of the economy," Petition, 15, and permits New Jersey to impose restrictions on distribution

methods that Congress has rejected. Petition, 12, 13. Despite the rhetoric, however, there is nothing in the Petition worthy of this Court's attention.

A. The NJFPA is Consistent With Federal Franchise Legislation and Leaves Congressional Commerce Clause Power to Regulate the National Economy Unimpaired.

Congress obviously could preempt state legislation on franchising or on any other subject affecting interstate commerce. Indeed, although CCC's Petition misleadingly suggests otherwise, Congress has in fact legislated on the subject of franchising in interstate commerce. In the Automobile Dealer's Day-In-Court Act, Pub. L. 1026, ch. 1038, Aug. 8, 1956, 70 Stat. 1125, 15 U.S.C. § 1221 *et seq.*, it dealt comprehensively with the same issues of inequality of bargaining power in the automobile industry that the NJFPA addresses more generically. Section 2 of that Act, 15 U.S.C. § 1222, imposes an obligation on automobile manufacturers "to act in good faith in performing or complying with the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise with said dealer." This language is the source of the language on termination in the NJFPA. Significantly, that seminal federal franchise protection legislation expressly preserved a role for state law, providing that

> "[t]his chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision in this Chapter and an express provision of State law which can not be reconciled."

15 U.S.C. § 1225. As the Supreme Court of New Jersey notes in *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 130 N.J. at 340, the NJFPA was amended in 1977 to deal more specifically with automobile industry franchising. N.J.S.A. 56:10-16 to -29. That legislation is authorized by 15 U.S.C. § 1225.

More recently in the Petroleum Marketing Practices Act, Congress addressed the protection of franchisees in the distribution of petroleum products. Pub. L.95-297, Title 1, June 19, 1978, 92 Stat. 322, 15 U.S.C. § 2801 *et seq.* The Petroleum Marketing Practices Act deals comprehensively with both termination and non-renewal of franchises, carefully circumscribing the power of franchisors in the petroleum industry to do either. 15 U.S.C. § 2802, 2804. In contrast with the Automobile Dealers Day-In-Court Act, however, Congress dealt with the preemption of state law somewhat more restrictively:

> To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the non-renewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the non-renewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

15 U.S.C. § 2806(a). Congress thus permits state law protection of franchisees against termination and non-renewal in the petroleum industry so long as the state law is "the same as" the federal law.

In two of the largest segments of the national economy therefore—the automobile and the petroleum industries—Congress has adopted franchise protection measures that are parallel to those in the more generic NJFPA. Moreover in neither instance did Congress restrict application of those pro-

tection measures to single state, rather than multi-state, franchises. It would be fanciful in the extreme for this Court to hold that the application of the NJFPA termination and nonrenewal provisions imposed an undue burden on interstate commerce in industries other than automobile and petroleum distribution when Congress has decided that such protections are *required* for the facilitation of interstate commerce in two of the largest segments of the national economy.

More significantly, the Automobile Dealers Day-In-Court Act and the Petroleum Marketing Practices Act demonstrate that Congress is perfectly aware of the disparity of bargaining power issue, addressed by New Jersey common law in *Shell Oil Co. v. Marinello*, *supra*, and by statute in the NJFPA. Congress is, moreover, perfectly capable of deciding for itself when and to what extent state law should be preempted. Even in those areas of the economy where Congress has chosen to legislate on franchise practices it has carefully preserved some role for state law. The NJFPA is a part of New Jersey's contract law; an area of the law that has traditionally been a matter for state regulation. In such areas of traditional state responsibility the presumption is that Congress intended to leave state law in place except to the extent that it has been expressly displaced.[6]

CCC's Petition thus presents no Commerce Clause policy issues that this Court ought to address. This Court has more serious business requiring its attention.

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[6] *See, e.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 120 L.Ed. 2d 407, 426-27 (1992); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184 (1988); *English v. General Electric Co.*, 496 U.S. 72, 85 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984); *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 304 (1977); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 447-48 (1960).

B. The Case Presents No Significant State Sovereignty Issue.

CCC concedes that the NJFPA does not discriminate against out of state franchisors. Its argument that the NJFPA projects New Jersey law into another state is not supported by the record. *Point IA, supra*. CCC's argument that the NJFPA in some way inhibits the sovereign law making power of neighboring states is answered adequately by the observations of the New Jersey trial judge, that "[t]o the extent that the laws of other states apply by reason of activities of the parties and the terms of those laws, they would apply," RA 3, and by the approval of that observation by the New Jersey Supreme Court. *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 130 N.J. at 346.

What is restrained by the NJFPA is not any sovereign power of another state, but only the actions of a private actor, CCC, with respect to the termination of a contractual relationship voluntarily undertaken, and governed by New Jersey law. The fact of that relationship and the applicability of New Jersey law to it were fully litigated in the New Jersey state courts, and cannot be relitigated in the guise of CCC's assertion of the sovereign interests of other states.

CCC identifies no state law that was violated by the methods of distribution engaged in by the parties pursuant to the 1984 franchise agreement, or that would be violated if the District Court should require that the same methods of distribution be continued. No other state's policy indicates a preference for CCC rather than ISI having exclusive distribution rights, and that is exactly what CCC seeks to accomplish.

CONCLUSION

CCC's Petition presents no question that this Court should address, and no issue that is worthy of its attention. The Petition for Certiorari should be denied.

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